

The Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

BRIAN HEINZ, individually and on behalf of all
others similarly situated,

Plaintiff,

v.

AMAZON.COM, INC. and DOES 1 through 10,
inclusive, and each of them,

Defendant.

No. 2:24-CV-000714-RSM

**REQUEST FOR JUDICIAL NOTICE
IN SUPPORT OF AMAZON'S
MOTION TO DISMISS**

ORAL ARGUMENT REQUESTED

NOTE ON MOTION CALENDAR:
November 22, 2024

I. INTRODUCTION

Pursuant to Federal Rule of Evidence 201 (“Rule 201”), defendant Amazon.com, Inc. (“Amazon”) respectfully requests that the Court take judicial notice of the following documents, true and correct copies of which are attached to the concurrently filed Declaration of John A. Goldmark in support of Amazon’s Motion to Dismiss (“Goldmark Decl.”):

- **Exhibit 1.** The Amazon.com Conditions of Use (“COUs”) publicly available on the Amazon.com website from at least June 1, 2021 through September 13, 2022, as they appeared on June 1, 2021. Goldmark Decl. Ex. 1.
- **Exhibit 2.** The COUs publicly available on the Amazon.com website from at least June 1, 2022 through September 13, 2022, as they appeared on September 13, 2022. Goldmark Decl. Ex. 2.
- **Exhibit 3.** The COUs publicly available on the Amazon.com website from September 14, 2022 through at least October 3, 2022, as they appeared on September 14, 2022. Goldmark Decl. Ex. 3.
- **Exhibit 4.** The COUs publicly available on the Amazon.com website from September 14, 2022 through at least October 3, 2022, as they appeared on October 3, 2022. Goldmark Decl. Ex. 4.
- **Exhibit 5.** The Amazon.com Privacy Notice (“Privacy Notice”) publicly available on the Amazon.com website from February 12, 2021 through June 28, 2022, as it appeared on the Amazon.com website on February 13, 2021. Goldmark Decl. Ex. 5.
- **Exhibit 6.** The Privacy Notice publicly available on the Amazon.com website from February 12, 2021 through June 28, 2022, as it appeared on the Amazon.com website on June 28, 2022. Goldmark Decl. Ex. 6.
- **Exhibit 7.** The Privacy Notice publicly available on the Amazon.com website from June 29, 2022 through December 31, 2022, as it appeared on the Amazon.com website on June 29, 2022. Goldmark Decl. Ex. 7.

- **Exhibit 8.** The Privacy Notice publicly available on the Amazon website from June 29, 2022 through December 31, 2022, as it appeared on the Amazon.com website on December 31, 2022. Goldmark Decl. Ex. 8.
- **Exhibit 9.** An image of the Purchase Page as it appears on the Amazon.com website, obtained on April 5, 2023. Goldmark Decl. Ex. 9.

As set forth below, each exhibit is judicially noticeable, and therefore the Court may consider them in ruling on Amazon’s Motion to Dismiss.

Indeed, in the Prior Action, this Court previously considered and decided to take judicial notice of each of these same documents. *Heinz v. Amazon.com, Inc.*, 2024 WL 2091108, at *2–3 (W.D. Wash. May 8, 2024) (“Prior Action”). The Court should again take notice of the same documents here for the same reasons as before. *See id.*

II. THE COURT SHOULD GRANT JUDICIAL NOTICE

On a motion to dismiss, a court may consider materials outside the complaint “if they fall within the exceptions to the ‘general rule that a district court may not consider any material beyond the pleadings in ruling on a Rule 12(b)(6) motion.’” *Wilson v. Playtika, Ltd.*, 349 F. Supp. 3d 1028, 1041 (W.D. Wash. 2018) (quoting *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001)). The first exception applies where a complaint incorporated external material into the pleading by reference. *Id.* at 1041–42. The second exception is under Rule 201, whereby a Court may take judicial notice of “matters of public record.” *Id.* at 1042 (citation & internal quotation marks omitted). Such matters of public record are those that “(1) [are] generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b). The documents for which Amazon seeks judicial notice fall within these exceptions, and therefore are the proper subject of judicial notice.

1 **A. The Conditions of Use, Privacy Notices, and Purchase Page Are Judicially**
2 **Noticeable (Exhibits 1–9).**

3 The COUs, Privacy Notices, and Purchase Page are judicially noticeable because they
4 appear on a publicly available website and their authenticity is not subject to dispute. Goldmark
5 Decl. ¶¶ 2–10; *see Wilson*, 349 F. Supp. 3d at 1042 (“The Court can take judicial notice of the
6 Terms because they derive from a ‘publicly accessible website.’”) (citation omitted). Courts
7 routinely take judicial notice of online terms and conditions and privacy policies, as well as
8 company webpages. *See id.* (taking judicial notice of terms of use); *Garner v. Amazon.com, Inc.*,
9 603 F. Supp. 3d 985, 993 (W.D. Wash. 2022) (taking judicial notice of survey that was publicly
10 available on webpage); *Calhoun v. Google LLC*, 526 F. Supp. 3d 605, 617 (N.D. Cal. 2021)
11 (taking judicial notice of “four versions of Google’s Privacy Policy” available on Google’s
12 website); *Opperman v. Path, Inc.*, 84 F. Supp. 3d 962, 976 (N.D. Cal. 2015) (collecting cases
13 taking judicial notice of publicly available policies). Further, “[i]t is common for courts to take
14 judicial notice of a company’s historical privacy policies[.]” *In re Facebook, Inc. Secs. Litig.*,
15 477 F. Supp. 3d 980, 1009–10 (N.D. Cal. 2020), and courts in this circuit treat webpages
16 retrieved from the Wayback Machine like any other webpage, *see Yuksel v. Twitter, Inc.*, 2022
17 WL 16748612, at *3 (N.D. Cal. Nov. 7, 2022) (“[D]istrict courts in this circuit have routinely
18 taken judicial notice of content from the Internet Archive’s Wayback Machine”; collecting cases
19 and taking judicial notice of webpages from Wayback Machine) (citation omitted); *FTC v.*
20 *LendingClub Corp.*, 2018 WL 11436309, at *4 (N.D. Cal. Oct. 3, 2018) (“Courts in this circuit
21 have noted that the Wayback Machine is ... a source” “whose accuracy cannot reasonably be
22 questioned”; collecting cases and taking judicial notice of webpage from Wayback Machine)
23 (citation omitted).

24 Heinz visited the Amazon Purchase page, and agreed to the COUs and Privacy Notices,
25 each time he made a purchase on Amazon.com, as alleged in his complaint. Dkt. 1 ¶ 10 (alleging
26 Heinz made “purchase[s] on Defendant’s website”); *see Heinz v. Amazon.com Inc.*, 2024 WL
27 2091108, at *1 (W.D. Wash. May 8, 2024) (holding COUs apply to Heinz’s claims). Heinz

1 cannot credibly dispute the authenticity of these documents. Nor can he dispute that he
2 proceeded through the purchase page containing the “Place your order” button, with the notice
3 “[b]y placing your order, you agree to Amazon’s [privacy notice](#) and [conditions of use](#),” when
4 making his alleged purchases. *Heinz*, 2024 WL 2091108, at *1. The Privacy Notices disclose
5 that Amazon records and uses the information Heinz communicates to Amazon, including with
6 the assistance of third-party vendors. The Privacy Notices are therefore central to Heinz’s
7 allegation that he did not consent to the alleged recording, and are appropriate for judicial notice.
8 *See* Dkt. 1 ¶¶ 1–2, 28, 31, 33, 47, 49, 59; *see Hulsey v. Peddle, LLC*, 2017 WL 8180583, at *1
9 n.1 (C.D. Cal. Oct. 23, 2017) (“The Court takes judicial notice of [defendant’s] Privacy Policy
10 because its authenticity is not contested and it is central to [plaintiff’s] claim that she did not
11 consent to receive texts”) (citing *Coto Settlement v. Eisenberg*, 593 F.3d 1031, 1038 (9th Cir.
12 2010)); *Stark v. Patreon, Inc.*, 635 F. Supp. 3d 841, 850 (N.D. Cal. 2022) (“The Court takes
13 judicial notice of the existence of [defendant’s online terms of use and privacy notice] and their
14 contents—as is relevant, for example, to show what exactly [defendant] *disclosed* in its
15 policies.”). Moreover, Amazon retrieved the historical versions of the COUs and Privacy Notice
16 from the Wayback Machine, Goldmark Decl. Exs. 1–8, which Courts routinely recognized as a
17 source “whose accuracy cannot reasonably be questioned.” *FTC*, 2018 WL 11436309, at *4.

18 As before, the Court should again thus take judicial notice of Exhibits 1–9 in ruling on
19 Amazon’s Motion to Dismiss. *See Heinz*, 2024 WL 2091108, at *2–3.

20 III. CONCLUSION

21 For the above reasons, Amazon respectfully requests that the Court take judicial notice of
22 the documents identified above.

23 DATED this 24th day of September, 2024.

24 DAVIS WRIGHT TREMAINE LLP
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26 By /s/ John Goldmark

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